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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN FRANCISCO DIVISION  
15

16 ORACLE AMERICA, INC.,  
17 Plaintiffs,  
18 v.  
19 GOOGLE INC.,  
20 Defendant.  
21  
22

Case No. 3:10-cv-03561 WHA

**GOOGLE'S OPPOSITION TO ORACLE'S  
MOTION IN LIMINE #1 – TO EXCLUDE  
EVIDENCE OF OPENJDK INCLUDING  
EXPERT TESTIMONY THEREOF**

Hearing: April 27, 2016  
Time: 8:00 a.m.  
Dept. Courtroom 8, 19<sup>th</sup> Fl.  
Judge: Hon. William Alsup

## I. INTRODUCTION

Oracle accuses Google of relying on an improper counterfactual, yet seeks to rewrite history to keep the jury from learning that in 2007, Sun published an open-source version of the Java SE platform called OpenJDK. The open source and royalty-free release of OpenJDK was part of Sun's broader business strategy to encourage developers to use the Java APIs and Java language, while competing on implementations. The OpenJDK license places no limits on licensees' ability to subset or superset the Java APIs—the very purported harm that Oracle made the centerpiece of its case in the first trial. Reporter's Transcript of 2012 Trial ("Tr.") at 218:6-9 (Oracle's opening statement: "So we talk about splintering Java or fragmenting Java. [Google] broke the basic set of rules governing the Java community. If you're going to do Java, you have to do all of it. You have to be consistent."). Despite its claim that Java is harmed when used in a way that is not "consistent" with standard Java, Oracle now seeks to exclude evidence that Sun itself invited precisely this alleged "harm" by open sourcing OpenJDK on terms that allowed licensees to "splinter" and "fragment" Java. Oracle argues that OpenJDK cannot support a finding of fair use, and claims that the evidence shows that Google would not have incorporated OpenJDK in Android in 2007. Neither contention has merit.

First, Sun's decision to release Java SE as free and open source is highly relevant to fair use. Sun's open-sourcing of OpenJDK is relevant to determining what uses a reasonable copyright owner would have consented to at the time, to its status as not just a published work, but one for which the *source code* was published, and to whether Sun's own actions, rather than Google's use, is the source of the purported harm to Java SE. OpenJDK is thus relevant to the balancing of all of the factors, as well as to the second and fourth fair use factors.

Second, Oracle mischaracterizes the evidence relating to OpenJDK. Oracle argues that Google rejected the OpenJDK license, but cites evidence pertaining to the OpenJDK *virtual machine*, and to the Java *ME* (not SE) class libraries, which are licensed under the GNU General Public License version 2 (hereinafter, the "GPL2" license). The OpenJDK class libraries, however, are licensed under a modified version of the GPL2 license—one that includes the "Classpath exception" that restricts the "copyleft" or "viral" effect of the GPL2 license (the GPL2

license *with the Classpath exception* is hereinafter referred to as the “Classpath” license).

Evidence concerning the GPL2 license thus has no bearing on whether Google could have used the OpenJDK class libraries, which are subject to the Classpath license, in Android.

In short, Oracle is wrong about the law, and wrong about the facts. Oracle’s motion should be denied.

## II. STATEMENT OF FACTS

In December 2006, Oracle announced that it would be releasing versions of Java ME and Java SE under open source licenses.<sup>1</sup> The OpenJDK *virtual machine* would be (and now is) licensed under the GPL2 license.<sup>2</sup> The OpenJDK *class libraries*, which include all of the declarations/SSO at issue in this case, would be (and now are) licensed under the Classpath license. *Id.* Contrary to Oracle’s suggestions, these licenses are very different. Due to what sometimes is called the “copyleft” or “viral” effect of the GPL2 license, if a licensee distributes an executable program created by combining GPL2-licensed code with its own code, the licensee generally must distribute the source code for the entire executable under the GPL2 license—including the source code for any additions the licensee may have made.<sup>3</sup> “Linking” independent software modules with GPL2-licensed code creates a “combined work,” which would trigger copyleft obligations under the GPL2 license.<sup>4</sup> But under an express “special exception” called the “Classpath exception,” the Classpath license allows such combinations “regardless of the license terms of these independent modules,” and allows the resulting executable to be distributed “under terms of [the licensee’s] choice.”<sup>5</sup>

The Classpath license thus does not impose the same copyleft obligations that the GPL2 license does. Sun’s FAQ about its Open Source versions of Java explained that the Classpath

<sup>1</sup> <https://web.archive.org/web/20061208025437/http://www.sun.com/2006-1113/feature/story.jsp>.

<sup>2</sup> <http://openjdk.java.net/faq/> (“GPL v2 for almost all of the virtual machine, and GPL v2 + the Classpath exception for the class libraries and those parts of the virtual machine that expose public APIs.”).

<sup>3</sup> See ECF 1566-2 (Hall Rpt.) at 70 (GPL2 § 3); see also *id.* ¶¶ 19-20 (explaining “copyleft”).

<sup>4</sup> See *id.* at 74 (Classpath exception); see also *id.* at 70 (GPL2 § 3).

<sup>5</sup> See *id.* at 74 (Classpath exception).

1 exception “allows you to link an application available *under any license*” to the Classpath-  
 2 licensed library “without that application being subject to the GPL’s requirement to be itself  
 3 offered to the public under the GPL.”<sup>6</sup> Sun recognized that this could result in “forks” of the Java  
 4 SE platform—and explained that it “expect[ed] great new ideas and valuable research to come  
 5 from forks to the platform.” *Id.* Sun knew that a licensee could “create an implementation that  
 6 isn’t compatible with the Java specification,” although they could not “label that implementation  
 7 with the Java Compatible or Java Powered brand and logo.” *Id.* Bradley Kuhn, who is on the  
 8 board of the Free Software Foundation (the author of the GPL2 and Classpath licenses), has  
 9 called the Classpath license an “extremely weak copyleft” license, and recalls that when the  
 10 Classpath license was named, he initially proposed calling it “the ‘Least GPL’ since the Classpath  
 11 exception carves so many holes in strong copyleft that it’s less of a copyleft than even the Lesser  
 12 GPL and probably the Mozilla Public License, too!”<sup>7</sup> (Google hereinafter refers to the “Lesser  
 13 GPL” license as the “LGPL” license.)

14 Android is also licensed on open source terms, but its primary open source license is a  
 15 different license, called the Apache 2.0 license.<sup>8</sup> Android includes (and has always included)  
 16 elements covered by other licenses, including the Linux kernel, which is licensed under the GPL2  
 17 license, and other components that are licensed under the LGPL license.<sup>9</sup> Code in Android that is  
 18 licensed under the GPL and LGPL licenses has not kept OEMs from adopting Android.

19 Although Android has historically used the class libraries originating with the Apache  
 20 Harmony project (hereinafter the “Harmony” libraries), on November 12, 2015—more than a  
 21 month before the close of fact discovery—Google announced in a company-internal email that it  
 22 was “moving the Java Language core libraries to an OpenJDK-based approach in the N release of  
 23 Android.”<sup>10</sup> On that day, Google served supplemental interrogatory responses disclosing this

24 <sup>6</sup> Mullen Decl. Ex. 1. [https://web.archive.org/web/20061201003425/http://www.sun.com/  
 25 software/opensource/java/faq.jsp](https://web.archive.org/web/20061201003425/http://www.sun.com/software/opensource/java/faq.jsp) (emphasis added).

26 <sup>7</sup> <http://ebb.org/bkuhn/blog/2016/01/05/jdk-in-android.html>.

27 <sup>8</sup> See ECF 1566-2 (Hall Rpt.) ¶ 106.

28 <sup>9</sup> See, e.g., Mullen Decl. Ex. 2 (Swetland Depo. at 84:21-25).

<sup>10</sup> Mullen Decl. Ex. 3 (Ghuloum Ex. 5020).

development, and noting in the service email that “Google is making available for inspection in-  
 development source code implementing versions of Android using OpenJDK, which is licensed  
 under the GNU General Public License, v.2 (GPLv2) with Classpath Exception.”<sup>11</sup> Oracle  
 inspected that source code on November 25, 2015.<sup>12</sup> Oracle then took the deposition of Anwar  
 Ghuloum, Google’s Rule 30(b)(6) designee regarding “[a]ll commercially acceptable, non-  
 infringing substitutes to all or any of the 37 Java API packages used in Android.”<sup>13</sup> Ghuloum  
 testified that Google’s use of OpenJDK class libraries is a commercially acceptable, non-  
 infringing alternative to its prior use of the Harmony class libraries.<sup>14</sup> He testified that he  
 “d[id]n’t think [OEMs] would have a problem with” the OpenJDK-based class libraries, and that  
 Google had “provided GPL code as part of the Android platform in the past.”<sup>15</sup> He also testified,  
 “We deal with GPL code with OEMs all the time. There are parts of the Android platform that  
 are GPL’d and we have GPL obligations as a result.”<sup>16</sup> Oracle concluded the deposition after less  
 than four hours on the record.<sup>17</sup> Oracle’s claim that it would be prejudiced by the admission of  
 evidence of what it calls “post-fact-discovery events”<sup>18</sup> thus rings hollow.

### III. ARGUMENT

#### A. OpenJDK is highly relevant to both fair use and damages.

*OpenJDK is relevant to fair use.* The Ninth Circuit has held that “fair use is appropriate  
 where a ‘reasonable copyright owner’ would have consented to the use, i.e., where the ‘custom or  
 public policy’ at the time would have defined the use as reasonable,” and that this is an  
 appropriate issue to bear in mind when balancing the fair use factors. *Wall Data, Inc. v. LA Cnty.*  
*Sherriff’s Dep’t*, 447 F.3d 769, 778 (9th Cir. 2006) (citation omitted). Thus, the jury is entitled to

<sup>11</sup> Mullen Decl. Ex. 4 (11/12/15 Kamber email).

<sup>12</sup> *Id.*, ¶ 2. Indeed, Oracle’s representatives showed up nearly two-and-a-half hours late, and inspected source code for barely more than three hours. *See id.*

<sup>13</sup> *Id.*, Ex. 5 (Ghuloum Depo. at 8:23-9:14).

<sup>14</sup> *Id.* at 26:20-27:13.

<sup>15</sup> *Id.* at 57:20-58:2, 61:20-21.

<sup>16</sup> *Id.* at 34:16-19.

<sup>17</sup> *See id.*, ¶ 3.

<sup>18</sup> Mot. at 10.

1 consider evidence that Sun voluntarily *did* consent to use of the declarations/SSO. The jury is  
 2 also entitled to consider that Sun made the express decision to license the OpenJDK *class*  
 3 *libraries* (including all of the declarations/SSO at issue) under the less restrictive Classpath  
 4 license, which is compelling evidence that it was reasonable for Google to use the  
 5 declarations/SSO from the 37 Java SE API packages in Android.

6 OpenJDK is also relevant to the second fair use factor, the nature of the copyrighted work.  
 7 17 U.S.C. § 107(2). A work’s *unpublished* status is “a critical element of its ‘nature.’” *Harper &*  
 8 *Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 564 (1985). And open sourcing OpenJDK  
 9 is the antithesis of keeping a work unpublished; Sun elected to publish not only Java SE in its  
 10 object code form, but also *the source code* for OpenJDK, including the declarations/SSO for the  
 11 37 packages at issue. Considering this evidence would not, as Oracle claims, “eviscerate” open-  
 12 source licenses, any more than it would “eviscerate” publishing to consider that quoting from a  
 13 published work is more likely to be a fair use than quoting from an unpublished work. *See id.* at  
 14 564. Moreover, open sourcing of OpenJDK is consistent with its CEO’s testimony that it was  
 15 “trying to make open APIs and compete on implementations.” Tr. at 1962:12-14, 2003:11-12  
 16 (Schwartz). Sun’s decision to “publish,” *i.e.*, make the source code for the OpenJDK class  
 17 libraries available under the Classpath license, is important evidence that bears directly on the  
 18 second factor of the fair use analysis.

19 OpenJDK is also relevant to the fourth fair use factor, the effect of Google’s use on the  
 20 potential market for or value of Java SE. 17 U.S.C. § 107(4). If Sun’s *own actions* limited Java  
 21 SE’s market, Google’s use cannot have caused that harm. Oracle executive Safra Catz testified at  
 22 the previous trial, “It’s pretty hard to compete with free.” Tr. at 2322:12 (Catz). Oracle itself  
 23 licenses OpenJDK (including all of the declarations/SSO at issue) for free. Contrary to Oracle’s  
 24 suggestions, Google has never advanced the argument that this evidence is relevant because the  
 25 royalty-free nature of the OpenJDK license by itself entitled Google to use the declarations/SSO  
 26 from the 37 Java SE API packages (separate and apart from OpenJDK). Instead, the relevance is  
 27 the extent to which the potential market for or value of Java SE was limited by Sun’s own  
 28 licensing decisions, rather than harmed by Google’s use. The fact that Sun (and now Oracle)

1 licenses the OpenJDK class libraries under the open source Classpath license is certainly relevant  
2 to that inquiry.

3 Indeed, for these reasons, evidence about the OpenJDK class libraries is highly relevant to  
4 fair use *regardless* of Google’s use of them. That said, the strongest evidence that Google (or any  
5 other OpenJDK licensee) *could* have used the OpenJDK declarations/SSO and created a platform  
6 such as Android is the evidence that Google, relying largely on a single engineer, *did in fact*  
7 change its codebase in about six months from Harmony to OpenJDK-based class libraries for the  
8 37 Java SE API packages at issue.<sup>19</sup> Indeed, using the OpenJDK class libraries in 2007 would  
9 have been substantially *easier* than the switch today, because the Android codebase was smaller  
10 and less complex at that time. *Id.*

11 ***OpenJDK is relevant to damages.*** Even if the jury declines to find fair use, OpenJDK is  
12 highly relevant to damages. First, OpenJDK is relevant to Oracle’s claim for \$475 million in lost  
13 Java ME licensing profits. As discussed by Google’s damages expert Dr. Leonard, Sun’s  
14 supposed lost licensing profits were a result of factors other than Android’s allegedly unfair use  
15 of the declarations/SSO from the 37 Java SE API packages.<sup>20</sup> In the “but for” world, Dr. Leonard  
16 opines that Android still would have existed, and could have used the declarations/SSO—or even  
17 the complete implementations—from OpenJDK for the 37 Java SE API packages at issue.<sup>21</sup> The  
18 existence of OpenJDK prior to the Android launch thus severely undercuts Oracle’s claim that its  
19 failure to meet internal forecasts can be attributed solely to Google’s allegedly unfair use of the  
20 declarations/SSO.

21 OpenJDK is also relevant to determining Google’s profits attributable to its allegedly  
22 unfair use. One way to quantify those profits is to measure the costs Google avoided by its  
23 allegedly unfair use of the declarations/SSO.<sup>22</sup> As one way to measure these avoided costs, Dr.  
24 Leonard calculates what it would have cost Google to switch from the Harmony class libraries to

25 <sup>19</sup> ECF 1563-7 (Leonard Rpt.) ¶ 176 (citing interview with Ghuloum).

26 <sup>20</sup> *Id.* ¶ 211.

27 <sup>21</sup> *Id.*; see also ECF 1564-6 (Malackowski Rpt. ¶180) (applying a “but for” test).

28 <sup>22</sup> ECF 1563-7 (Leonard Rpt.) ¶ 174 (discussing “bottom up” apportionment).



1 the OpenJDK class libraries, prior to the Android launch.<sup>23</sup> Dr. Leonard concludes that “[t]he  
 2 incremental cost to Google of implementing the OpenJDK libraries”—and thus its avoided  
 3 costs—“would have been about . . . \$85,000.”<sup>24</sup> Evidence about OpenJDK therefore is relevant  
 4 both to Oracle’s claim of lost profits and to calculating Google’s profits allegedly attributable to  
 5 its allegedly unfair use of the declarations/SSO.

6 **B. The evidence does not show that Google was concerned about the Classpath**  
 7 **license.**

8 Throughout its motion, Oracle intentionally blurs the distinction between the GPL and  
 9 Classpath licenses in an effort to exclude evidence about OpenJDK. Significantly, Oracle cites  
 10 evidence, wholly out of context, to argue that in 2007, Google was unwilling to adopt class  
 11 libraries that were licensed under the Classpath license. But a complete reading of the evidence  
 12 shows no such thing. Instead, the record shows that Google well understood the differences  
 13 between the GPL2 and Classpath licenses. To the extent that there is evidence that some Google  
 14 employees had a different view of OpenJDK, Oracle is free to bring that evidence out on cross-  
 15 examination. Oracle cannot, however, rely on that evidence (which, at most, amounts to  
 16 misrepresenting one single email) to preclude all evidence relating to OpenJDK.

17 Oracle’s motion is replete with evidence taken out of context, quoting snippets of emails  
 18 and testimony without regard to whether the evidence relates to OpenJDK or to the open source  
 19 version of Java ME, which is subject to the GPL2 license. For example, Oracle quotes Android  
 20 engineer Brian Swetland saying that a Sun license “effectively prevents you from using it in most  
 21 any embedded product unless the entire thing is GPL.”<sup>25</sup> But the “it” in that phrase refers to the  
 22 open source version of Java *ME* (not OpenJDK), which Swetland notes is licensed under “GPL-  
 23 only”—i.e. the GPL2 license, not the Classpath license.<sup>26</sup> In the same email string, another  
 24 Android engineer, Cédric Beust, notes that he “would be happy if we can just drop in their

25 <sup>23</sup> *Id.* ¶¶ 175-78.

26 <sup>24</sup> *Id.* ¶ 178.

27 <sup>25</sup> See ECF 1563-14 (Beust email).

28 <sup>26</sup> See also <https://web.archive.org/web/20061201003425/http://www.sun.com/software/opensource/java/faq.jsp> (“Sun chose GPL v2 without the Classpath exception for the phone ME software”), Mullen Decl. Ex. 1.



libraries” but that he’s not sure whether this would be compatible with Sun’s licensing choices. *Id.* Beust’s email responds to emails discussing the possibility that Java *ME* might be licensed only under the GPL2 license, and thus the context suggests that Beust’s email is referring to the *GPL2* license for the open source version of Java *ME*, not the Classpath license. Likewise, Swetland’s testimony that the “licensing” for “Sun’s open source Java core libraries” was “inappropriate,”<sup>27</sup> is about Java *ME* and the *GPL2* license. Swetland had just explained that he was testifying about “the mobile—you know, the mobile—the smaller version of these libraries.”<sup>28</sup> And it was his understanding that the “Classpath license that clearly allows linking without issue” applied only to the “desktop and server product” while the “mobile” version was licensed “without such protection.”<sup>29</sup>

Oracle takes the same liberties in citing evidence that refers to the OpenJDK *virtual machine* (not at issue in this upcoming trial), not the OpenJDK class libraries. Oracle quotes Andy Rubin as saying that the “GPL license (Sun’s license) doesn’t work for us,” but Rubin’s statement is an explanation why Google would still need “skelmir.”<sup>30</sup> “Skelmir” is a company that the Android team talked with about acquiring a *virtual machine* and class libraries.<sup>31</sup> Unless Google was willing to accept the GPL2 license for the OpenJDK *virtual machine*, Google would still need “skelmir,” as Rubin explained. An email exchange between Rubin and Android engineer Bob Lee cited by Oracle is more of the same. Rubin says, “we do not want carriers or OEMs to be required to go to Sun if they are customers of our platform,” but this follows a prior email where he says “as far as GPL-ing the VM, everything that is linked with the VM would get infected,” demonstrating that this concern was with the OpenJDK *virtual machine*, which was licensed under the GPL2 license.

Finally, Oracle makes much of an email exchange that, at best, shows that there *might*

<sup>27</sup> Mullen Decl. Ex. 2 (Swetland Depo. at 139:3-8).

<sup>28</sup> *Id.* at 140:2-3.

<sup>29</sup> *Id.* at 142:24-143:7.

<sup>30</sup> *See id.*, Ex. 6 (TX 155).

<sup>31</sup> *Id.*, Ex. 7 (McFadden Depo. at 81:8-12).

1 have been different views among some Google employees about using OpenJDK. Oracle cites a  
 2 2009 email exchange between Josh Bloch and another Google employee, Jesse Wilson, in which  
 3 Wilson suggests considering the use of the OpenJDK class libraries in Android.<sup>32</sup> But by 2009,  
 4 Android had already launched, and switching to OpenJDK class libraries from the already proven  
 5 Harmony class libraries appeared to be wholly unnecessary, in light of Sun lauding the Android  
 6 efforts for “strapp[ing] another set of rockets” on Java.<sup>33</sup> And in 2009, other companies, such as  
 7 IBM, were still focusing their open source efforts on the Harmony class libraries rather than  
 8 OpenJDK.<sup>34</sup> Google’s apparent decision not to further discuss Wilson’s OpenJDK proposal *in*  
 9 2009 thus made ample sense, regardless of the license applicable to the OpenJDK class  
 10 libraries.<sup>35</sup> And other than Bloch’s supposition, Oracle points to no evidence that Wilson’s  
 11 suggestion was rejected due to licensing concerns.

12 Thus, contrary to Oracle’s claims, the record does not show that Google rejected  
 13 OpenJDK because of licensing restrictions. To the extent that Oracle seeks to establish otherwise  
 14 at trial, it is entitled to cross-examine Google witnesses, but it cannot preclude all evidence about  
 15 OpenJDK.

16 **C. Hall’s opinion meets all the criteria required for expert testimony.**

17 Oracle contends that Andrew Hall should not be permitted to testify regarding OpenJDK  
 18 because his testimony is inadmissible contract interpretation and he lacks the required expertise to  
 19 opine on the Classpath license. Oracle is mistaken on both points.

20 First, Oracle makes plain that it intends to attempt to confuse the jury by conflating the  
 21 GPL2 license with the Classpath license. Hall is an expert on open source licensing,<sup>36</sup> and can

22  
 23 <sup>32</sup> ECF 1563-18 (Bloch email).

24 <sup>33</sup> Mullen Decl. Ex. 8 (Schwartz blog post, TX 2352).

25 <sup>34</sup> It was not until the following year, 2010, that IBM moved its support from the Harmony class  
 libraries to the OpenJDK project. See <http://www.sutor.com/c/2010/10/ibm-joins-the-openjdk-community/>.

26 <sup>35</sup> By way of contrast, by 2015, when Google announced it would be adopting some OpenJDK-  
 27 based class libraries for the “N” release of Android, the Android team was the only group  
 working on the Harmony class libraries. Mullen Decl. Ex. 5 (Ghuloum Depo. at 158:11-15).

28 <sup>36</sup> ECF 1566-2 (Hall Rpt.) ¶ 6.

1 provide the jury with important background about open source licensing and the differences  
 2 between various open source licenses applicable to Android, including the Apache 2.0 license that  
 3 is used for much of the platform, the GPL2 license that is used for the Linux kernel (and the  
 4 license discussed in almost all of the evidence Oracle cites in support of its motion), the LGPL  
 5 license (which applies to Webkit, which has shipped as part of Android from the beginning) and  
 6 the Classpath license (which is the license applicable to the OpenJDK class libraries).<sup>37</sup>

7 Second, Oracle can't diminish Hall's expertise by suggesting that he merely dabbles in  
 8 Java as a hobby. Hall is not only a licensing expert, but a trained computer scientist and engineer  
 9 with a specialized practice that focuses on, among other issues, advising clients on the  
 10 incorporation of open-source software into commercial and closed-source products and services  
 11 and other commercial dependencies upon open-source software.<sup>38</sup> Hall's dual-field training  
 12 provides him the background necessary to explain what "linking" means, and to explain how  
 13 "linking" relates to the use of the OpenJDK class libraries.<sup>39</sup> And his computer science training  
 14 offers an ample basis to testify that the computer science definition of "linking" is consistent with  
 15 the way the term is used in the Java Language Specification and the Java Virtual Machine  
 16 Specification.<sup>40</sup> Hall offers a *technical* opinion regarding the linking done by OEMs and  
 17 developers, and how that is relevant to the Classpath license, not a *legal* opinion.<sup>41</sup> And,  
 18 therefore, his testimony is relevant and admissible.

#### 19 IV. CONCLUSION

20 Oracle's motion should be denied.

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24 <sup>37</sup> See *id.* ¶¶ 28-83.

25 <sup>38</sup> *Id.* ¶¶ 6, 8.

26 <sup>39</sup> See, e.g., *id.* ¶¶ 84-88, 92.

27 <sup>40</sup> See *id.* ¶¶ 89-91.

28 <sup>41</sup> See, e.g., *id.* ¶¶ 93-97, 119 (discussing "linking" in the context of Java programs, and in the context of Android in particular).

1 Dated: April 6, 2016

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